No. 2628

in the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

In the Matter of R. S. Miller,
A Bankrupt,

OLMSTED-STEVENSON COMPANY
(a corporation),
Petitioner,

vs.

R. S. MILLER,
Respondent.

John B. Clayberg.
Attorney for Petitioner

Reply Brief for Petitioner

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REPLY BRIEF FOR PETITIONER

In reply to respondents brief, the following is suggested by the attorney for the petitioner.

1. To the point that there is no showing in the record that it contains all the evidence considered by the court below, we desire simply to suggest, that in the verified amendment to the petition

it is stated that, "the said district court of the U. S. District of Montana, heard said bankrupts petition for review, upon the testimony returned by the referee and upon the briefs of counsel for the respective parties"(Tr. p. 38).

A motion to dismiss the petition, under the new equity rules, is equivalent to a demurrer under the old practice, therefore everything properly alleged in the petition, is deemed to be true, upon the argument of the motion.

None of the cases cited by respondent on his first point, (Brief pgs.2,3&4) are parallel with or applicable to the case at bar. In each case the record contained no findings of the court below or of the referee, and no testimony which was considered by the referee and by the court, at the hearing of the various petitions. Therefore we submit there is nothing in respondents first point of their brief.

We have found great difficulty in preparing the record on this petition. The Bankruptcy Act makes no provision for the procedure, and ammy of the different Courts of Appeal of the United States have enacted rules providing what the record should contain, and the procedure whereby the record is completed. We find no such rules in this circuit.

It is said by the Appellate Court in Meyer Drug Company vs. Poptin Drug Company 136 Fed. 936;

"the trustee of the bankrupt's estate moves to dismiss this petition to revise, because it was not allowed by any judge of this lower Court; no bond has been given; the transcript of the record filed is not certified by the clerk of the lower Court; the transcript does not contain the pleadings in which the issues were tried, nor show who are the proper parties to this proceeding the transcript doesnot contain the evidence upon which the findings of the referee were based; the petition to revise was filed more than three months after the entry of the judgment below, and lastly no supersedias has been granted.

In our opinion none of these grounds are well taken. The Statute allows the petition to revise to be filed on due notice, but provides no rules as to any of the requisites or formalities referred to in the motion to dismiss."

As stated in the argument, if the court is of the opinion that anything further is necessary to complete the record, we ask that we may be allowed to make it complete before the case is decided by the court.

2 As to the estoppel.

(a) Counsel only quote from one paragraph of the original petition filed, wherein is alleged a charge of fraud upon the part of the bankrupt in concealing property. Paragraph 8 of said petition (Tr. p. 5) should also be considered.

In this paragraph there is alleged the omission of the growing crop from the schedules, by the bankrupt, with no allegation of fraud. Paragraph 10 of said petition (Tr. p. 5) alleges that the bankrupt never turned over the growing crop to the trustee in bankruptcy, witnout any allegation of fraud.

So that we have in the petition, not only the allegation of fraudulent concealment of property, but allegations that the bankrupt failed and omitted to place the growing crop in the schedule of assets and that he never turned it over to the trustee in bankruptcy.

Counsel says that fraud is a ground of opposition to the discharge of the bankrupt, and not having been presented against the granting of the discharge, it is waived. He evidently over looked the proposition that what-ever may be urged against a discharge, may be equally urged in a proceeding to set aside a discharge, especially when the facts upon which the application is based are discovered after the bankrupt has been discharged, as was alleged in the original petition herein. (Tr.p.6). Counsel has evidently over looked the fact that the purpose of the original petition was to revoke the discharge, open the case, and have the bankrupt directed to amend his schedule.(Tr. p.6&7).

(b) Counsel says that we did not raise the question in court below, that the bankrupt had not properly pleaded and proven the estoppel claimed by him and therefore the same can not be urged at this hearing. It is difficult ot con-

ceive how counsel can conclude that this point was not urged at the court below. The record does not disclose what points were urged. But we submit, that, even though it was not presented to the court below, this court has full authority ot determine whether the respondent properly pleaded the estoppel claimed or introduced any evidence in support thereof. As stated in the argument, we have been unable to find any proper allegation or any evidence sufficient to sustain the estoppel claimed. Counsel for respondent has not seen fit to direct the attention of the court to any such allegation or evidence. This being the condition, the court must conclude that the estoppel does not exist. With reference to this matter we desire toagain call the attention of the court to the propositions announced in our opening brief, that the respondent never claimed that he expended any money or labor upon the growing crop, in reliance upon the inaction of the owner of the growing crop, and never claimed that such ownership arose from an estoppel against petitioner. The court's attention is also again directed to the fact, that respondent kept and accurate and itemized account of all labor and money spent upon said crop, in maturing, thrashing, and marketing the same--even so closely as to include the number of pounds of oats the horses ate while taking care of the crop.

Under all the circumstances we submit that respondent is not entitled to rely upon the estoppel claim.

AS TO WHETHER THE GROWING CROP

PASSED TO THE TRUSTEE

(3) Counsel have apparently misconceived our position upon the main question involved. We have not insisted that, because one might mortgage property, it was not exempt. Such position would have been puerile. We contend that growing crops are not exempt under the statutes and decisions of Montana.

Sec. 6 of the Bankrupt Act, provides that bankrupts are allowed such exemptions as are prescribed by the state laws in force at the time of the filing of the petition.

The Court of Appeal (8th Circuit) in the case Steele vs. Buel (104Fed.868), after quoting the provisions of section 6 of exemption in the most absolute and unqualified terms, and that rule is the state law". The Supreme Court of U.S. in the case of Smalley vs. Langenour (196 U.S. 93) has said; "The rights of a bankrupt to property as exempt, are those given him by the state statutes."

Counsel have not disputed this proposition. Neither has he asserted that under the statutes of Montana, growing crops are exempt.

Our contention throughout this matter has been, that growing crops are not exempt under the laws of Montana, and therefore, the bankrupt, having a right to sell the same, they pass to the trustee in bankruptcy, as an asset for the benefit of creditors.

Counsel's entire argument on the question herein involved, seems to only to be effort on his part, to convincee the court that the growing crop was exempt to the bankrupt and therefore did not pass to the trustee. He does not dispute the proposition that court of bankruptcy, in determining what is exempt to the bankrupt, only recognize the statutes of the state in which the bankruptcy proceedings are instituted and carried on.

Neither does counsel contest the proposition that growing crops are not included in the exemption Statute of Montana.

This being true, this court has not power to hold such crop exempt, and the question involved must be determined by the application of the provisions of Sec. 70 of the Bankrupt Act.

There can be no doubt that the bankrupt might have sold or transferred this growing crop, at any time after the same was planted, and that by such sale, and in order to make same effective, the purchaser would have had the right ot enter upon the land to care for, harvest, and remove the crop without being a trespasser. This brings the entire matter clearly within the first clause of Subd. a Sec.70 of the Bankrupt Act.

By filing his voluntary petition in bankruptcy, the bankrupt placed himself in the same legal right results. The trustee would have the right to enter upon the land, care for, harvest, and remove the crop just the same as would a purchaser.

By filing his voluntary petition in bankruptcy it was his duty in consideration of receiving the benefit of the Bankrupt Act, which was thereby sought, to turn over to the trustee, all his property not exempt. The title to such property passed by operation of law, and with this title there was given permission to enter upon the land, care for, harvest, and remove the crop.

In illustration and support of this position we desire to call the court attention to In re Coffman 93 Fed. 422. In that case a certain cotton crop was growing upon a homestead at the time of filing a voluntary petition of bankruptcy. The bankrupt harvested the crop, and the trustee sought to compell him to turn the same over for the benefit of creditors. Bankrupt claimed that the growing crop was exempt, and insisted that it could not pass to the trustee because he would be compelled to commit a trespass in going upon the land to gather the crop. The court, however, says;--"but in case of voluntary bankruptcy, when the bankrupt comes forward and tenders all his property, not subject to execution, to be applied ratably upon his debts in order that he may reap the benefits of the Bankrupt Act, the question may well be asked, does he not by his action extend an invitation and give warrant to the trustee to come upon the homestead and gather what belongs to his creditors."

The court ordered the bankrupt to deliver the product of the crop to the trustee.

We submit we can see no escape for the bankrupt in this case and therefore, confidently submit the matter to the court for decision.

Jno. E. Clayberg
Attorney for Petitioner.